

CATHERINE TRAVERS AND } APPELLANTS ;  
 BOYLE TRAVERS (PLAINTIFFS) }

AND

THE RIGHT REVEREND TIM- }  
 OTHY CASEY ; AND VERY REV- }  
 EREND MONSIGNOR THOMAS }  
 CONNOLLY, EXECUTORS OF THE }  
 LAST WILL OF THE RIGHT REV- }  
 EREND JOHN SWEENEY, DE- } RESPONDENTS.  
 CEASED, THE ROMAN CATHOLIC }  
 BISHOP OF SAINT JOHN AND }  
 THE SAID VERY REVEREND }  
 MONSIGNOR THOMAS CON- }  
 NOLLY (DEFENDANTS) ..... }

1904  
 \*Feb. 19,  
 22, 23.  
 \*March 10.

ON APPEAL FROM THE SUPREME COURT OF NEW  
 BRUNSWICK.

*Corporation sole—Roman Catholic Bishop—Devise of personal and ecclesiastical property—Construction of will.*

The will of the Roman Catholic Bishop of St. John, N.B., a corporation sole, contained the following devise of his property :—  
 “Although all the church and ecclesiastical and charitable properties in the diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education and charity, in trust according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of St. John, New Brunswick, in trust for the purposes and intentions for which they are used and established.”

*Held*, affirming the judgment appealed from (36 N. B. Rep. 229) that the private property of the testator as well as the ecclesiastical property vested in him as Bishop was devised by this clause and the fact that there were specific devises of personal property for other purposes did not alter its construction.

\*PRESENT :—Sir Elzéar Taschereau C.J., and Sedgewick Davies Nesbitt and Killam JJ.

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APPEAL from a decision of the Supreme Court of New Brunswick (1) affirming the decree of the Judge in Equity in favour of the defendants.

The only question to be decided in this case was the construction of the clause set out in the head-note of the will of the late Right Reverend Bishop Sweeny, of St. John, N.B. The plaintiffs filed a bill in Equity for a decree that the Bishop died intestate as to the real and personal property which he owned in his private capacity, the plaintiff, Catherine Travers, claiming the same as his next of kin. The Judge in Equity decided that there was no intestacy and his judgment was affirmed by the full court. The plaintiffs then took an appeal to this court.

*Pugsley K.C.* and *Quigley K.C.* for the appellants. This will was prepared by the testator himself but the construction must be the same as if it had been written by a lawyer. *Thellusson v. Rendlesham* (2).

The surrounding circumstances must be taken into consideration in construing it. *Webber v. Stanley* (3).

(The learned counsel then referred to the evidence and admissions of the respondent shewing that the testator was possessed in his private capacity of family property and of real estate that was conveyed to him for ecclesiastical purposes.)

These admissions and the evidence referred to shew that the title to property intended for church purposes was vested in the testator as an individual and it was such property he had in mind when he wrote the clause containing the general devise. He says in that clause that all church property should be vested in the Bishop in trust for church purposes and he bequeaths all his property to the church in trust for such purposes. He thus identifies the property conveyed to

(1) 36 N. B. Rep. 229.

(2) 7 H. L. Cas. 429 at p. 519.

(3) 16 C. B. N. S. 698.

the individual but which should have been conveyed to the ecclesiastical corporation. See the rule of interpretation laid down by Lord Westbury in *Parker v. Tootal* (1), and Lord Selborne's rule in *Hardwick v. Hardwick* (2).

The fact that the testator may have died intestate as to the portion of his property claimed by the appellants cannot be invoked against the construction called for by the language of the will and surrounding circumstances. *Webber v. Stanley* (3) approved in *Smith v. Ridgway* (4); *Pedley v. Dodds* (5); *Slingsby v. Grainger* (6).

The heir at law cannot be disinherited except by clear and unambiguous language. *Ferguson v. Ferguson* (7); *Hall v. Warren* (8).

*Stockton K.C.* and *Barry K.C.* for the respondents. The disputes between the Bishop and his sister were disposed of by the reciprocal deeds of partition, the payment of \$2,000 to Mrs. Travers, the appellant, and the releases from the appellants to Bishop Sweeny in 1894. The release is to the Bishop as an individual; as administrator of his father's estate; as a trustee of that estate, if such relationship existed, and also as Bishop of Saint John. These transactions took place in 1894. The appellant, Mrs. Travers, had her share of her father's estate and the Bishop had his. Each could do with her or his share as it seemed to them best. The property then ceased to be property belonging to any estate. Shortly after that, in April, 1895, the Bishop made the will in controversy in this suit. Is it reasonable to suppose he meant not his own estate, his individual property, but property belonging to the church?

(1) 11 H. L. Cas. 143.

(2) L. R. 16 Eq. 168.

(3) 16 C. B. N. S. 698.

(4) L. R. 1 Ex. 46.

(5) L. R. 2 Eq. 819.

(6) 7 H. L. Cas. 273.

(7) 2 Can. S. C. R. 497.

(8) 9 H. L. Cas. 420.

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He was not making a will as Bishop of Saint John; he could not will church property if he had so desired. All such property by operation of law was continued to his successor in the office of Bishop.

The court must avoid, if possible, giving any effect to the argument that the Bishop intended to die intestate, as to his individual property, and that the true construction of the clause quoted must be confined to church property, because he happened at the time of his death to hold two or three unimportant pieces of church property in his individual name. We must construe the will and ascertain its meaning and intent from the language used. The proper interpretation of the language will give his intention.

The rule of construction, applicable to all wills, is well settled and must dispose of this appeal as laid down by Lord Wensleydale in *Grey v. Pearson* (1). The ordinary sense of the words is to be adhered to, unless that would lead to absurdity, repugnance or inconsistency. A long list of cases from that time to the present have followed that rule, the latest of which is *Inderwick v. Tatchell* (2). Practically the same rule is laid down in *Roddy v. Fitzgerald* (3); and *Abbott v. Middleton* (4). The courts, if possible, should so construe wills as to avoid an intestacy: *Edgeworth v. Edgeworth* (5), per Lord Hatherly, at p. 40; *In re Redfern, Redfern v. Bryning* (6); *In re Harrison* (7), per Esher M.R.

The reason assigned by the testator for giving all his property to his successor, even if incorrect, cannot control a bequest actually made or power given. *Cole v. Wade* (8); *Holliday v. Overton* (9); *Williams v.*

(1) 6 H. L. Cas. 61 at p. 106.

(2) [1903] A. C. 120.

(3) 6 H. L. Cas. 823.

(4) 7 H. L. Cas. 68.

(5) L. R. 4 H. L. 35.

(6) 6 Ch. D. 133.

(7) 30 Ch. D. 390.

(8) 16 Ves. 27.

(9) 14 Beav. 467.

*Pinckney* (1); Jarman's 12th rule, vol. 2, (5 ed.) 841; *Ex parte Dawes* (2), per Esher M.R.

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As to the doctrine of *ejusdem generis*, limiting the operative words of the will by the preceding words, the will can only apply to the testator's individual property, he could not will property not his own, and the courts will disregard the doctrine when the effect of regarding it would be to cause a partial intestacy. See Underhill and Strahan on Interpretation of Wills, p. 21; *Parker v. Marchant* (3); *Anderson v. Anderson* (4), per Esher M.R. If he intended his individual property to go to his heirs-at-law, why did he not, by apt and plain words, say so? In this case the ordinary grammatical meaning of the words used is large enough and sufficiently explicit to devise and transfer all the testator's estate to his successor in office. Any other construction would be straining the language from its ordinary meaning and cause an intestacy, which the courts, if possible, must avoid. The following cases also support the contentions of the respondents, viz.: *Hodgson v. Jex* (5); *Shore v. Wilson* (6); *Scalé v. Rawlins* (7); *Theilsson v. Rendlesham* (8); *Lowther v. Bentinck* (9); *Leader v. Duffey* (10); *Jones v. Curry* (11).

The respondents also adopt the authorities and reasons given in the judgments in the courts below, and from these authorities and reasons, and the authorities cited herein, contend that the judgment of the Supreme Court of New Brunswick should be affirmed, and the appeal dismissed, and with costs.

(1) 77 L. T. 700.

(2) 17 Q. B. D. 275.

(3) 1 Y. & C. C. 290.

(4) [1895] 1 Q. B. 749.

(5) 2 Ch. D. 122.

(6) 9 Cl. & F. 355 at p. 525.

(7) [1892] A. C. 342.

(8) 7 H. L. Cas. 429.

(9) L. R. 19 Eq. 166.

(10) 13 App. Cas. 294.

(11) 1 Swanst. 66, 72.

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THE CHIEF JUSTICE.—I have had communication of my brother Davies's opinion and I agree in his reasoning and conclusion. I shared at one time in his doubts, and I cannot say that I am yet thoroughly satisfied that the testator intended to bequeath his private property to the Church. But though the case on the part of the appellant was as forcibly and ably argued by Dr. Quigley as it could possibly have been, yet he failed to convince me that the judgment appealed from is clearly wrong. The testator would have given nothing to the Church if his will is to be construed as bequeathing only what really belonged to it, and the devise of all *his* estate real and personal would be a devise of none of *his* estate at all.

SEDGEWICK J.—I am of opinion that the appeal should be dismissed with costs.

DAVIES J.—The question for determination in this case is the true construction of the general devise or bequest in the will of the Right Reverend John Sweeney, late Roman Catholic Bishop of St. John, N.B. The clause reads as follows :

Although all the church and ecclesiastical and charitable properties in the Diocese are and should be vested in the Roman Catholic Bishop of St. John, New Brunswick, for the benefit of religion, education, and charity, in trust, according to the intentions and purposes for which they were acquired and established, yet to meet any want or mistake, I give and devise and bequeath all my estate, real and personal, wherever situated, to the Roman Catholic Bishop of Saint John, New Brunswick, in trust for the purposes and intentions for which they are used and established.

The will was written by the Right Reverend gentleman himself, and it was admitted in the answer to the bill filed praying for a declaration as to the meaning of the will that, at the time it was written and also when the testator died, several parcels of real estate which should

have been vested in the Bishop in his corporate name in trust for the Roman Catholic Church for the benefit of religion, education and charity

stood on the records in the name of Bishop Sweeney personally.

I concur in the conclusion reached by the Equity judge, Mr. Justice Barker, who heard the cause, that there has been no intestacy and that everything the Bishop owned or possessed at his death, and which was not otherwise specifically devised in his will, passed under this clause to the Roman Catholic Bishop of St. John. I agree in general with the reasons for his judgment given by that learned judge, but as I entertained for a time grave doubts arising out of the ambiguous language used at the close of the clause quoted above, I think it desirable to add a few words. The judgment of the Equity Court was confirmed on appeal by the Supreme Court of New Brunswick and this appeal is taken from the latter judgment.

In the able and exhaustive argument addressed to us by Dr. Quigley, for the appellant, much stress was laid upon the opening words of the disputed devise although all the church and ecclesiastical and charitable properties etc. etc., yet to meet any want or mistake.

It was said that these words had reference to two subject matters only; 1st, to the real estate, admittedly standing in the Bishop's personal name and which should have stood in his corporate name; and, secondly, to certain personal property and effects used by the Bishop in and about the services of his cathedral but admittedly not his private property; and it was argued that the words were intended to rectify the "want or mistake" referred to in the clause and afforded a key to and controlled the meaning of the general words which followed. I cannot accede to this argument. The utmost that can be said for the language used is

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that it expressed, in a more or less ambiguous way, reasons or motives which influenced the testator in making the general disposition of his property which followed. Standing alone however the words could not be fairly construed as limiting to church properties only the generality of the succeeding devise. My difficulties and doubts arose not out of the introductory words of the devise but of those at its close, namely,

in trust for the purposes and intentions for which they are used and established.

Were these descriptive of the property devised or only a limitation upon the user of that property? What did "they" refer to? The word could not, says the appellant, refer to his own private estate whether real or personal, for the language is quite inapplicable to such properties, and being inapplicable the conclusion must be that he was dealing only with the church properties standing in his name or used by him in the services of the church and to which the words were applicable. But reflection has convinced me that however inapt the language of the sentence may be the meaning is sufficiently plain and that the words are not descriptive of the property intended to be devised but are simply a limitation upon the user of that property, or, in other words, a trust. The word "they" in my judgment, refers to the "church, ecclesiastical and charitable properties in the diocese" which in the beginning of the sentence he had declared are and should be vested in the Roman Catholic Bishop of St. John, N.B., for the benefit of religion, education and charity. He desired to devise as well the church properties standing in his personal name as also his own private properties to his successor and intended to impress upon them all the trusts for religion, education and charity, upon which as he



had declared in the opening part of the sentence, the Bishop should hold all the church and ecclesiastical and charitable properties. Difficulties may possibly arise in determining to which of the particular trusts the private property of the Bishop embraced in the general devising words should be subject, whether for the benefit of religion or education or charity, and in what proportion for each. But that his intention was to devise and bequeath all he owned or possessed at his death to his successor in the Bishopric, and to and for the benefit of the Roman Catholic religion, education and charity within the diocese, I am satisfied. I think that intention sufficiently well expressed and if the language does not leave a legal discretion sufficiently broad to the devisee, then, any difficulties arising out of the trusts must be disposed of as and when they arise on a proper application to the courts. No such difficulties are before us for determination now and once it is held that the words are not words descriptive of the property devised and bequeathed but are simply expressive of a trust we need go no further.

It was argued that the specific bequests of the coupon bonds held by the testator to the Roman Catholic Bishop of St. John, for the special purposes mentioned in the will, shewed that the general words of the disputed clause did not include all of his personal estate and that the further bequests of \$500 to have masses

said for the benefit of his soul and the souls of his departed relatives and \$100 to one of his executors

in token of good will and on account of trouble he may have in the execution of the will

confirmed that view. The argument is a legitimate one to advance. But the fact that the bequests of the coupon bonds was made for certain special trusts and purposes set out in the will, shows that the testator's

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intention was that these special bonds whatever their amount (about which there was much dispute but no evidence) should be applied only for the particular objects specified by him and not generally

for the benefit of religion, education and charity in connection with the Roman Catholic Church in his diocese.

He "earmarked" them accordingly. There is more weight in the argument arising out of the other two small bequests but looking at the purposes for which they were made and the trivial amount of the bequests I do not think they should be considered as in any way altering the construction which otherwise should be given to the words of the general devise.

Much learning and ingenuity were expended by counsel in suggestions as to what, having regard to the evidence, the deceased Bishop may or must have intended. In the view, however, I take as to the meaning of the disputed clause, all such speculations are of no assistance. The distinguished prelate must be taken to have meant what he said in his will, and that meaning is the one, in my opinion, decreed by the Court of Equity and confirmed by the Supreme Court of New Brunswick.

I think the doubts and difficulties necessarily arising from the use of language somewhat doubtful and ambiguous in the will, and the great gain which must follow from an authoritative decision of the highest Court of Appeal in Canada as to the meaning of these words, fully justified the appeal being taken and that the costs should be paid out of the estate.

NESBITT and KILLAM JJ. concurred in the dismissal of the appeal.

*Appeal dismissed with costs.*

Solicitor for the appellant: *William Pugsley.*

Solicitor for the respondents: *John L. Carleton.*